IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CASE NO. 5:07-HC-2167-D

UNITED STATES OF AMERICA

vs.

MARC CHRISTOPHER TURNER
Respondent.

RENEWED MOTION TO DISMISS WITH INCORPORATED MEMORANDUM OF LAW AND CITATION OF AUTHORITIES

NOW COMES, Marc Christopher Turner, Respondent, and renews for consideration by this Honorable Court, prior to the Commitment Hearing, issues raised in previous filings with this Court [DE 4] and respectfully asks this Honorable Court to dismiss this proceeding initiated under 18 U.S.C. § 4248 based on the "Due Process" and "Equal Protection" arguments advanced herein. In support of this Motion, the Respondent shows as follows:

Historical Premises of Commitment Proceeding

Respondent was preparing to be released by the Federal Bureau of Prisons on September 7, 2007 when he was served with the instant "Certification of a Sexually Dangerous Person" [DE 1]. Respondent has no prior notice of the filing of this Certification (he did not have the option of participating in a hearing, of any sort, regarding the filing of this certification before September 7, 2007) - the petition was just filed and served upon him. Respondent has no prior convictions of "child molestation" or "sexually violent crime." Now, four years and nearly three months later, his commitment hearing is finally set on a calendar for hearing pursuant to the terms of §4248. Respondent raises now issues regarding "due process" and "equal protection" that were, at least, by implication raised by prior counsel and should be presented to Your Honor for hearing and, at a minimum, for purposes of preservation.

I. DUE PROCESS

Respondent argues that the entire statutory scheme of §4248 is, by its inherent process, and impact

on an inmate, such as Respondent, a criminal proceeding and, accordingly, all of the constitutional protections of the Fifth and Sixth Amendments apply. The analogy to a standard criminal prosecution to a proceeding under §4248 is striking and entirely consistent with a normal criminal process instituted by the Government - this comparison shows that this proceeding starts with the filing of a "charging document" (here a certification), includes discovery (what is labeled as "disclosures"), and, ultimately, allows the inmates to have his period of incarceration extended to life. This process is all completed without providing the inmate to Sixth Amendment rights which include a jury trial, his Fifth Amendment rights to an "unconditional" right against self-incrimination, his right to demand that all allegations in the charging document be proven beyond a reasonable doubt, his right to due process in knowing the maximum and minimum term of imprisonment at the institution of the process.[1] Not the first of these rights were afforded to Respondent.

Assuming the argument that §4248 is determined to be under a label "civil," despite the reach of incarceration (punishment) that can be placed upon Respondent, this provision and its statutory scheme still are facially, and applied to this specific Respondent, unconstitutional. The application of a civil label does not prevent this "process" of commitment from infringing and violating other constitutional protections afforded to Respondent and still mandates dismissal of the certification and proceeding against Respondent. These constitutional protections include the following:

A. *Ex Post Facto* Application. (Article 1, §9 of the Constitution).

Respondent is in the custody of the Attorney General and his status was being managed by the Federal Bureau of Prisons several years before the filing of the certification. Suddenly, and without notice, the Government revises and extends the initial prison sentence of Respondent and sets up a process to extend that sentence to a possible life sentence. A *post hoc* legislative enactment such as this is

[1]This issue was raised in two cases argued before the Fourth Circuit Court of Appeals on October 28, 2011, *United States v. Timms* (4th Cir. No. 11-6886) and *United States v. Hall* (4th Cir. No. 11-7102); these two appeals are still under consideration by the Fourth Circuit.

unconstitutional. See *Lynch v. Matthis*, 519 U.S. 433, 4421 (1997). A retroactive revision of the Respondent's initial sentence and period of supervised release in this method is unconstitutional, even in what an appellate court may deem a "civil" proceeding.

B. Double Jeopardy. (Fifth Amendment to the Constitution).

Section 4248 is premised on the "inmate" being in federal custody - there must be a prior conviction with an active sentence. This act now punishes the Respondent again (with the threat of a maximum sentence of life) in direct reliance on his prior federal conviction in 2001. This is the heart and essence of how §4248 operates in its application to the Respondent and others. The prior conviction is used repeatedly with respect to the three prong statutory questions of §4248 and throughout by the Government in formulating its "civil" case against the Respondent.

The United States Supreme Court for more than one hundred years has held reign over legislature enactments and Congress and stated repeatedly and with emphasis to the legislative body - "you just cannot do this, it violates 'Double Jeopardy'." *Ball v. United States*, 163 U.S. 662, 669 (1896); *Baum v. Rushton*, 572 F.3d 198, 206 (4th Cir. 2009). If the Supreme Court has interpreted a provision in state legislation as violative of double jeopardy "punishing twice, or attempting to punish criminally for the safe offense . . . ," *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997), then the same rule must be applied to Respondent. If this is a civil proceeding (which is still a "toss-up," the reliance on the Respondent's prior conviction in federal court, his status of being "in custody" for the last day upon certification which references this prior conviction in the certification, and the use of the conviction to jump "hoops" of the three questions posed in §4248, unquestionably, runs afoul of the double jeopardy protection afforded to Respondent. Through this proceeding, the Government seeks to punish the Respondent for a second time for an offense which has previously been punished - this the "nuts and bolts" of what is taking place in this case. Second

punishment based on a prior conviction is outlawed by double jeopardy.

C. Statutory Rights of an Accused.

The following provisions of Federal Statutes and distilled into the Federal Criminal Rules are abridged by the process that has been used against the Respondent in this case: the right to initial appearance (Fed. R. Crim. P. 5(a)); the right to preliminary hearing (Fed. R. Crim. P. 5(c)); detention or bail hearing pursuant to 18 U.S.C. §3142; the indictment for an offense which carries more than one year in prison (Fed. R. Crim. P. 7); and a speedy trial within seventy days, 18 U.S. C. §3161. Respondent has never been afforded any of these rights or any right similar to these rights. No judicial official has read from a charge sentence and advised him of the maximum sentence of life. Respondent has sat in custody for over four years and waited as these statutory rights and his constitutional rights have been violated. The only remedy here is dismissal of the case as it sits now against Respondent.

D. No Hearing (Due Process).

The certification is served on Respondent as he packs to leave federal prison - September 7, 2007. His first chance at a hearing - to look at a judicial officer - is during the two week term of November 28, 2011. The Fifth Amendment demands that a responding party have notice and the opportunity to be heard in a timely manner. *Fuentes v. Shevin*. 407 U.S. 67, 80 (1972). There is no justification that can be extended by the Government to justify the delay in the commitment process as afforded to this Respondent. This is not the case where the Respondent has a record of criminal convictions of "actual touching" of a victim. The convictions cited by the Government in its certification are not "hands on." There is testimony from the Government's expert, Dr. Dale Arnold, that these offenses as set out in the certification are not *per se* "sexually dangerous." So the first of the three prongs in § 4248 is in question in this case.

In this proceeding, all parties are talking about the most precious right given by birth to an individual - his right to personal freedom. In reviewing delay in proceedings and violation of the right to a timely hearing, the Supreme Court has viewed as the second in three factors about due process, the

potential of "erroneous deprivation" of this constitutional protection. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), The issue of "erroneous deprivation" of Respondent's personal freedom demands and the interpretation of these cases demanded and still demands "expedited" and, at a minimum, timely hearing. Such hearing and opportunity to be heard have not been afforded to Respondent. See *Ahearn v, O'Donnell*, 109 F. 3d 809, 815 (1st Cir. 1997).

What is so striking is that there is no reason nor explanation as to why the Government could not have filed the certification and held the hearing before the Respondent's initial release scheduled for September 7, 2007. If this process had been availed, there would have been no additional incarceration if the confinement was found not to be proven by "clear and convincing evidence." But then to wait and delay the proceeding to this point in time and give the Government a "head start" in terms of finding experts and compiling disclosures, violates any and all rights that Respondent had to a timely hearing, as protected by the "due process clause." Respondent's rights have been "stepped on" and infringed and the only relief that is consistent with the Constitution is dismissal.[2]

II. EQUAL PROTECTION

If a classification is so inclusive or under-inclusive so that it no longer bears a rational relationship to the government's purpose allegedly addressed by the classification, then the classification violates the Constitutional guarantee of equal protection of the law. *Burlington N. R.R. v. Ford*, 504 U.S. 648, 653 (1992).[3] In the present case, all "person[s] who [are] in the custody of the Bureau of Prisons" may be certified as a sexually dangerous person by the Attorney General or the Director of the Bureau of Prisons

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[2]This issue is discussed in a part of the opinion published by the Fourth Circuit in *United States v. Broncheau*, 645 F.3d 676 (4th Cir. 2011).

[3]"[T]he Supreme Court has not squarely addressed the appropriate level of scrutiny to apply to civil commitment statutes." *Hubbert v. Knapp*, 379 F. 3d 773, 781 (9th Cir. 2004). Because the liberty interest implicated by indefinite commitment strikes at the "heart" of the Due Process Clause, *Zadvydas* 533 U.S. at 690, it implicates a fundamental right and heightened scrutiny to his Equal Protection claim. Respondent will, however, argue as though rational basis scrutiny applies in order to demonstrate that the government's arbitrary classification system violates any level of scrutiny.

and subjected to a civil commitment hearing, regardless of whether that person has any history of sexually violent conduct. 18 U.S.C. §4248(a).

The Act potentially subjects every federal prisoner, simply by virtue of being a federal prisoner, to a hearing at which the prisoner could indefinitely lose his fundamental right to liberty. The class of "all federal prisoners," be3ars absolutely *no relation*, let alone a rational relation, to the governmental purpose of committing sexually dangerous individuals. "Based upon the most recent date . . . it is estimated that rape and sexual assault offenders account for . . . about *1%* of those serving time in Federal prisons." Sex Offenders and Offenses, Bureau of Justice Statistics (revised 2/6/1997) at 16-17 (emphasis added). In addition, most individuals who would qualify as sexually dangerous are not in the federal prison system. Unlike the vast majority of states, which rationally limit their classifications to individual who have committed or been formally charged with a sexually violent offense, §4248 transforms mere status as a federal prisoner into eligibility for lifelong civil commitment. This arbitrary classification bears no relation to the purpose motivating the statute; the fact that an individual may have robbed a bank or possessed narcotics does not relate in any way to the question of whether he should be forced into a sexual predator civil commitment hearing at the pleasure of the director of the Bureau of Prisons. Considering the facial arbitrariness and risk for prejudice inherent in using one's status as a prisoner as a surrogate for a rational classification system, the Supreme Court has expressly rejected just such an approach. In *Baxtrom v. Herold*, the Court examined a New York system under which the state subjected prisoners suspected of mental illness to a different civil commitment proceeding than it subjected non-prisoners suspected of mental illness. 383 U.S. 107, 111 (1966). The Court noted that a state may, consistent with equal protection, use one's status as a prisoner "for purposes of determining the type of custodial or medical care to be given." *Id*. The Court continued, however, that such status:

> *has no relevance whatever* in the context of the opportunity to show whether a person is mentally ill at all. For purposes of granting judicial review . . . of the question whether a person is mentally ill and in need of institutionalization, *there is no conceivable basis* for distinguishing the

> commitment of a person who is nearing the end of penal term from all other civil commitments. *Id*. at 111–12. (emphasis added).

Put simply, a state violates equal protection through using one's status as a prisoner to control the nature of the proceedings used to determine whether to subject someone to civil commitment.

In *Jackson v. Indiana*, the Supreme Court expanded and emphasized this understanding of the Equal Protection Clause, noting that

> The harm to the individual [charged with a crime] is just as great if the State, without reasonable justification, can apply standards making his commitment a permanent one when standards generally applicable to [those not charged with a crime] afford [those others] a substantial opportunity for release. . . . [W]e hold that by subjecting [petitioner] to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded [to those not charge with offenses], Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment."

406 U.S. 715, 729-30 (1972)(discussing *Baxtrom*).

In fact, in *Humphrey v. Cady*, the Supreme Court expressly extended the *Baxtrom* holding to civil commitments of sexual offenders. *Humphrey v. Cady*, 405 U.S. 504 (1972). The Court noted that Wisconsin held persons convicted of a sexually motivated crime to a different civil commitment standard than it held those not convicted of a crime. *Id*. at 508 (comparing the Wisconsin Sex Crimes Act to the Wisconsin Mental Health Act). The Court then stated that perhaps Wisconsin could draw such a distinction consistent with equal protection "with respect to an initial commitment . . . which is imposed in lieu of a sentence, and is limited in duration to the maximum permissible sentence," *Id.* at 510-11. The Court, however, continued that the distinction "can carry little weight . . . with respect to the subsequent renewal proceedings [authorized by Wisconsin law], which result in five-year commitment orders based on new findings of fact, and are in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime." *Id*. at 511. In other words, an individual's presence in the criminal justice system does not provide a reasonable basis on which to distinguish that person's civil commitment

proceeding for sexual dangerousness from any other civil commitment proceeding.

The irrational disconnect created by the §4248's classification actually exceeds that imposed by the states and found wanting in *Baxtrom, Jackson,* and *Humphrey*. In those cases, the states used one's status as a prisoner simply to determine which of two sets of procedures to apply at a civil commitment hearing. Section 4248, by contrast, uses one's status as a prisoner to determine *whether to subject one to a civil commitment hearing at all*. Persons in federal prison are subjected to a 18 U.S.C. § 4248 hearing at the pleasure of the Director of the Bureau of Prisons; persons outside of federal prison can never be subjected to a §4248 hearing. As the Supreme Court has held, this arbitrary distinction lacks a "conceivable basis" and "has no relevance whatsoever" to the purposes behind civil commitment. As the Court has noted, the government "discriminates against [someone] in violation of the Equal Protection Clause of the Fourteenth Amendment" when it subjects him to specific civil commitment proceedings simply "because he at one time committed a criminal act." *Foucha*. 504 U.S. at 84-85 (plurality opinion of White, J.).

The Seventh Circuit recently confronted a similar issue and reached a similar conclusion. In *Varner v. Monohan*, 460 F.3d 861 (7th Cir. 2006), the court examined tow Illinois civil commitment laws for sexual offenders, one of which required a conviction for a sex offense as a precondition for a commitment hearing, and one of which did not. The Court noted that "[t]he difference between those with a criminal record of sexual offenses and those without is vital. . . .[I]t is sensible (if it is not compulsory) to give [those without a record of criminal conviction] additional protection in the form of a higher burden that the state must surmount." *Id*. at 865-66. (For this reason, §4248 actually violates both under inclusion and over inclusion under the Equal Protection Clause.)

In contrast to this analysis, §4248 creates *no* distinction between those with a record of sexually violent conduct and those without. All prisoners, no matter their history (or lack of history) of sexually violent conduct and those without. All prisoners, no matter their history (or lack of history) of sexually violent conduct is subjected to the same clear and convincing standard of proof before indefinite civil

commitment. Equal protection simply forbids the government from relying on such an over inclusive and irrational classification.

Conclusion

18 U.S.C. §4248 is unconstitutional as applied to Marc Christopher Turner; protection afforded him under the concept of "Due Process" (specifically, the issue regarding the timeliness of this hearing and the delay between the filing of certification and Turner's right to appear at a hearing) are paramount and mandate that this Honorable Court take the step of dismissing the certification. With respect to the equal protection afforded to all persons under the Constitution, the "Adam Walsh Act" (18 U.S.C. §4248) violates both the over inclusion and under inclusion of the "Equal Protection Clause." Anyway one views this case, Marc Turner has suffered at the hands of a law that is unconstitutional and has been applied in an unconstitutional manner to him through the certification and pending nature of this matter for over four years. Mr. Turner, through his counsel, respectfully requests that this certification be dismissed with prejudice.

Respectfully submitted, this the 21st day of November, 2011.

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CERTIFICATE OF SERVICE

The undersigned certifies and stipulates that a copy of this foregoing Motion was electronically filed consistent with Local Rule 49.2 and served on the persons listed below:

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This the 21st day of November 2011.

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